# STATE OF MICHIGAN

# COURT OF APPEALS

WALTER MARTLEW,

Plaintiff-Appellee,

v

CITY OF BENTON HARBOR,

Defendant-Appellant,

and

JOSEPH L. HARRIS,

Defendant.

UNPUBLISHED
May 1, 2014

No. 311897
Berrien Circuit Court
LC No. 11-000321-CK

Before: WHITBECK, P.J., and HOEKSTRA, and GLEICHER, JJ.

PER CURIAM.

Plaintiff Walter Martlew sued defendant city of Benton Harbor (the City), seeking payment for services rendered under a contract. The circuit court agreed with Martlew that the City owed him for tasks undertaken despite that certain milestones triggering the duty to pay had not occurred by the time of contract termination. Although we find the circuit court's analysis lacking, we agree with the result as the court sitting as the decisionmaker in the bench trial could fill the holes in the contractual provisions. We therefore affirm.

## I. BACKGROUND

Effective February 21, 2008, Martlew agreed to become a private contractor for the City, responsible for building plan review, building inspections, and demolition permit consideration. On December 9, 2010, the City notified Martlew that it would terminate their contract effective January 31, 2011. This notice was consistent with the contract's termination provision: "Upon submission of written notification 30-days in advance, either the city or the contractor can terminate this agreement."

Upon the termination date, various projects on which Martlew had conducted some work remained open. When Martlew received the termination notice, he warned the City, "your letter fails to address one critical issue, namely, the funds associated with my deferred billings of work-in-process that are due me. Those funds are attributable for work commenced in 2008 and

2009, as well as more recently started projects." Martlew advised the City that he would seek full payment on all open projects because "there is no accurate formula that may be used to calculate a pro-rated percentage complete for work performed as of a specified date. The work of inspections is neither linear nor mapable."

The City refused payment based on contractual provisions, describing that it would pay Martlew a set percentage of the permit fees when various milestones were reached. Specifically, the contract provided, in relevant part:

> **3. Compensation/Payment:** The City shall pay for such services as have been set forth herein, upon submission of proper invoices.
>
> The contractor shall submit itemized invoices for all plan review, building permit, and inspections services provided under this Agreement identifying:
>
> **Invoices:** Contractor invoices shall specify plan review completed, all building permits issued and date of issuance
>
> **3.1 Plan Review fees collected and/or waived**
>
> A. Contractor shall invoice City at a rate equal to fifty percent (50%) of all plan review fees collected and/or published in the City fee schedules.
>
> B. One hundred percent (100%) of all respective plan review fees shall be invoiced upon completion of said plan review.
>
> **3.2 Building Permit Fees collected and/or waived**
>
> A. Contractor shall invoice City at a rate to [sic] seventy percent (70%) of building permit fees collected and/or published in the City fee schedules.
>
> B. Permits which require no on site inspections:
>
> 1. Contractor shall invoice City for one hundred percent (100%) of fees due upon Contractor's approval of permit application if said permit is deemed to not require on-site inspection(s).
>
> C. Permits which require on-site inspections:
>
> 1. All building permits which require on-site inspections shall be invoiced and payable to Contractor at the following rates:

> a. Fifty percent (50%) payable at completion of rough framing,
>
> b. Fifty percent (50%) payable at final inspection and[/]or issuance of occupancy certificate; or in the case of project default and/or non-conformance /non-compliance upon *Notice of Revocation* of the building permit.
>
> * * *
>
> **3.5 Payment Schedule:** All Contractor invoices shall be submitted on a bi-weekly basis and become due and payable within five (5) business days.

Martlew requested $94,109.44, representing the figure he would have received had he completed the project milestones listed in paragraph 3.2.C for all open projects.

In October 2011, Martlew filed suit against the City seeking payment under the contract for services rendered. After discovery and recalculating prorated fees for work actually completed, Martlew adjusted his request to $70,923.10.

The court conducted a one-day bench trial and issued its written opinion and order one week later. The court entered a judgment against the City for the full amount of requested damages, reasoning:

> On January 31, 201[1], [Martlew] had completed substantial work on projects that had not yet reached the milestones for his invoice[s] to be payable under Paragraph 3.2.C of the Contract, and was prevented by the termination from completing the work necessary to reach the milestones.
>
> . . . [Martlew] seeks to recover $70,923.10 based on his estimates of the percentages [sic] work he performed on the uncompleted projects before being prevented from further performance by the City's exercise of its right to terminate the contract.

In relation to the applicable law, the court concluded:

> [W]here as here, a contract is unambiguous, it must be enforced as written. Paragraph 3 of the Contract provides that the City shall pay for [sic] [Martlew] "for such services as have been set forth herein, upon submission of proper invoices[."] The requirements for a proper invoice are then set forth as "contractor invoices shall identify plan review completed, all building permits issued and date of issuance." Nothing in the invoice requirements imposed on [Martlew], and thus nothing in the unequivocal payment requirement imposed on the City, required [Martlew] to specify final inspection and[/]or issuance of occupancy certificate to invoke the City's duty to pay. . . . The payment obligation had been indelibly set in the first sentence of paragraph 3. Paragraph

> 3.2.C is merely a timing provision. . . . In the ordinary course, the payment for the remaining 50% earned for of [sic] the on-site inspections was to be invoiced and paid at final inspection and[/]or issuance of occupancy certificate. However, a deviation from the ordinary course occurred when the City exercised its right to terminate the contract. The termination prevented [Martlew] from finishing the projects to the point of final inspection or issuance of an occupancy certificate. Because the City's termination, albeit permitted by the contract, prevented the completion triggering the time for payment, [Martlew] is entitled to be paid for the value of the work he performed up to January 31, 2011.

As the City had not rebutted the amount requested by Martlew, the court awarded Martlew the full amount, finding:

> As of January 31, 2011, [Martlew] had performed work valued at $70,923.10 on projects on which he could not complete his work to final inspection or issuance of an occupancy certificate because the termination prevented him from doing so.
>
> * * *
>
> The City prevented [Martlew] from performing the building inspection services on the invoiced projects to the point of final inspection or issuance of an occupancy certificate.

The court also found that the City had benefited as a result of this work.

## II. ANALYSIS

The City complains on appeal that the circuit court erroneously concluded that it prevented Martlew from performing inspection services to project completion. The City contends that this conclusion tainted the court's review of the contract and its factual findings. As a result, the circuit court improperly granted Martlew payment in violation of the contract's payment provisions, the City asserts.

"We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010).

> In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) (citations omitted).]

The parties' contract provided that Martlew would submit invoices for his services to the City on a biweekly basis. The invoices were to include billings for plan reviews completed and building permits issued during the two-week period. Martlew's duties spanned the time of a

building's construction, however, and involved multiple steps between plan approval and issuance of a certificate of occupancy. Rather than remunerating Martlew for each task, the contract required Martlew to front his labor and collect 50% of his fee "at completion of rough framing" and the remainder at final inspection or when the certificate of occupancy was issued. The contract also permitted termination by either party with 30 days notice.

These contractual provisions are clear and unambiguous. But the contract omitted description of how the City would pay Martlew for services rendered in relation to buildings under construction that had yet to reach the completion of rough framing or were not ready for final inspection and occupancy. "[W]hen a contract is incomplete because it fails to provide for a contingency, courts both at common law and under the Restatement may supply constructive conditions or 'gap fillers' to avoid failure for indefiniteness." *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 669; 473 NW2d 268 (1991) (BOYLE, J., concurring). See also 6 Corbin, Contracts (rev ed), § 26.2[A], p 403 ("A more candid explanation is that the contract left a gap—it made no prescription for an omitted case—and some decisionmaker . . . must now fill that gap.").

The need for a gap-filler in this case was of great import as Martlew had expended significant time fulfilling his contractual obligations to the City and by terminating, even though permitted in the contract, the City avoided its duty to pay. It is established hornbook law that when one party terminates a contract after the other has already begun performance and the terminating party has benefitted from the services, it is unjust to forego payment for the services rendered. See 15 Williston, Contracts (4th ed), § 44.56 (discussing the equity of payment for part or substantial performance); 8 Corbin, Contracts (rev ed), § § 36.9-36.10 (discussing the measurement of damages following partial performance). Under similar circumstances, this Court has allowed a terminated party to recover the value of services rendered under an uncompleted contract before his or her termination. See *Plunkett & Cooney, PC v Capital Bancorp Ltd*, 212 Mich App 325, 331; 536 NW2d 886 (1995) (client terminating attorney's employment). The terminated party is entitled to recover "the percentage of the services that have been completed pursuant to the contract, multiplied by the contract price." *Id*.

The circuit court inartfully worded its opinion and order, finding that the City prevented Martlew from completing his contracted-for services. This improperly suggests that the City breached the contract. The outcome of the circuit court's analysis was correct, however. The court was able to fill the gap in the parties' contract and require the City to pay Martlew for the value of services rendered. While Martlew initially invoiced the City for services he had not completed, i.e. asking for payment on projects as if he saw them through to final inspection, Martlew remedied this error by trial. And the City did not challenge Martlew's suggested value for the services he had actually rendered.

We affirm.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher